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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1178

FRED SAIGH and ELIZABETH SAIGH, by Relation to ANHEUSER-BUSCH, INC., a Corporation,
Petitioners,

vs.

AUGUST A. BUSCH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the St. Louis Court of Appeals.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Attorney for Petitioners.

HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Laws involved	3
Statement of the case	4
Argument	10
Conclusion	14
Appendix—Opinion and judgment of St. Louis Court of Appeals	15-44

Cases Cited.

Bouie v. City of Columbia, 378 U. S. 347, 354, 84 S. Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964)	11
Leggett v. Missouri State Life Insurance Company, 342 S. W. 2d 833, 851 (1960)	10
Merrill v. Davis, 359 Mo. 1191, 1201, 225 S. W. 2d 763, 768 (1950)	10
Santa Fe Hills Golf & Country Club v. Safehi Realty Company, 349 S. W. 2d 27, 34 (1961)	10
Surowitz v. Hilton Hotels Corporation, 34 Law Week 4196, 4198, 86 S. Ct. 845, 850	11, 13

Statutes Cited.

Constitution of the United States, Amendment XIV, Section 1	3, 7, 13, 14
Rule 23(b), F. R. C. P.	11, 12, 13
Rule 52.08(b), Missouri Rules of Civil Procedure (4 R. S. Mo. 4963, 2 V. A. M. R. 98)	3, 12, 13
28 U. S. C § 1257(3)	2

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To the St. Louis Court of Appeals.

Fred Saigh and Elizabeth Saigh, petitioners, pray that a Writ of Certiorari issue to review the judgment of the St Louis Court of Appeals entered on September 21, 1965.

OPINION BELOW.

The opinion of the St. Louis Court of Appeals is reported at 396 S. W. 2d 9. A copy of the Opinion and a copy of the Judgment are appended to this Petition as Exhibit A and Exhibit B, respectively.

JURISDICTION.

The judgment sought to be reviewed was entered by the St. Louis Court of Appeals on September 21, 1965. Petitioners' Motion for Rehearing or to Transfer Cause to the Supreme Court of Missouri was overruled by the St. Louis Court of Appeals on October 20, 1965. Petitioners' Motion to Transfer was overruled by the Supreme Court of Missouri on December 13, 1965. On March 11, 1966, this Court entered an Order extending the time for filing a Petition for Writ of Certiorari to and including April 11, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

I.

Are minority shareholders deprived of Fourteenth Amendment rights by a State Court's dismissal **with prejudice**, without a trial and without opportunity for pre-trial discovery, of their shareholders' derivative action for the recapture of excessive compensation given to their corporation's President, Chairman and Chief Executive Officer, on the ground that their petition did not allege that they had first sought relief from the shareholders, when under applicable State law such relief as that sought cannot be afforded by shareholder action?

II.

Can a State Court within the requirements of the due-process clause of the Fourteenth Amendment dismiss with prejudice a stockholder's derivative suit for failure to allege sufficient reasons for not seeking stockholder action,

on the ground that the only judicially cognizable excuse for not first seeking relief from shareholders is ownership or control by the defendant and the Board of Directors of a majority of the corporation's stock?

LAWS INVOLVED.

Section 1 of Amendment XIV of the Constitution of the United States provides in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 52.08(b) of the Missouri Rules of Civil Procedure (4 R. S. Mo. 4963, 2 V. A. M. R. 98), provides as follows:

> "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the petition shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The petition shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary, from the shareholders, such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

STATEMENT OF THE CASE.

This is a stockholder's derivative action filed by petitioners on May 7, 1963 (T. 2). Since January 1, 1954, and at the time of the filing of this suit, petitioner Fred Saigh owned 30,000 shares and petitioner Elizabeth Saigh owned 1,600 shares of the common stock of Anheuser-Busch, Inc. (Stipulation Par. 2(B)).

The Petition was filed in two counts (T. 2-6). Count I sought rescission of the sale of certain stock to the defendant, August A. Busch, Jr., President of Anheuser-Busch, Inc. (T. 4-5; Stip. Par. 2(C)). Count I is not involved in this Petition for Writ of Certiorari, having been severed for purposes of trial and appeal (T. 36a). Count II sought to recover for the corporation all benefits received by Mr. Busch in excess of a reasonable salary as President (T. 11).

On November 21, 1963, Mr. Busch filed a Motion to Dismiss Count II of petitioners' Second Amended Petition on the ground that "plaintiffs failed to allege in Count II of said Second Amended Petition that plaintiffs have sought relief from the other shareholders of the nominal defendant, Anheuser-Busch, Inc., or to state facts showing why plaintiffs failed to seek such relief; . . ." (T. 48).

On December 18, 1963, petitioners amended Count II of their Second Amended Petition to allege that the action which they sought could not be obtained from the stockholders because (a) such action was only within the power of the Board of Directors and not within the power of the stockholders, and (b) it was impossible for petitioners to secure the election of a different Board of Directors to obtain the desired action because Mr. Busch and the Board of Directors (i) controlled large blocs of stock, (ii) controlled the communications between the corporation and its large number of stockholders, (iii) have refused to list

the stock on a national securities exchange, with the result that proxy solicitations are not subject to the rules of the Securities and Exchange Commission, (iv) escaped disclosure of executive compensation by avoidance of the proxy solicitation rules, (v) escaped the necessity of mailing opposition proxy material and of including stockholder proposals in management's proxy material, by avoidance of the proxy solicitation rules, and (vi) have the benefit of soliciting proxies at corporate expense, as opposed to the great cost of a personal proxy solicitation at individual expense (T. 49, 53-55).

On December 18, 1963, Mr. Busch refiled his Motion to Dismiss petitioners' Second Amended Petition as amended (T. 56).

On January 20, 1964, the Circuit Court entered its Order, as amended on January 23, 1964, sustaining Mr. Busch's Motion to Dismiss and dismissing Count II of petitioners' Second Amended Petition *with prejudice* (T. 58-60).

Petitioners' Application for Leave to Amend Count II of their Second Amended Petition was denied on January 30, 1964 (T. 61-62). Their Motion for a New Trial was overruled on February 21, 1964 (T. 80-81).

Petitioners' Motion for a New Trial (T. 62-63) reads in part:

"Motion for New Trial as to Count II.

"Plaintiffs move the court to order a new trial in the above action as to Count II, and for grounds of this motion state:

"The court erred in sustaining the motion of defendant August A. Busch, Jr. to dismiss Plaintiffs' Second Amended Petition as amended and in dismissing said count thereof with prejudice, for the following reasons:

"1. The plaintiffs in said count did in law state a claim upon which relief could be granted; since

"(a) It was not 'necessary' for the plaintiffs to allege efforts to secure from the shareholders the action they desire, or the reasons for not making such effort; since the shareholders have no legal power to afford such relief; and

"(b) The plaintiffs did allege in said count the reasons for not making efforts to secure from shareholders the action they desire.

"2. The sole ground asserted by defendant Busch's motion was failure 'to state a cause of action', which is not required of a petition under the rules governing civil procedure in the Circuit Courts. The order was therefore without legal basis.

3. The court erred in entering a final judgment of dismissal with prejudice on sustaining the motion to dismiss; and foreclosing plaintiffs' right to apply for leave to amend, and adjudicating the case on the merits without affording plaintiffs an opportunity to be heard, in violation of the due process of law guaranties of both Missouri and the United States Constitutions.

"4. The court erred in dismissing the count with prejudice while there were pending interrogatories directed to the defendant corporation's directors, thus aborting the answers thereto, which would have produced information upon which could have been predicated more specific allegations of the reasons for plaintiffs' not making efforts to secure from shareholders the action they desire . . ."

Petitioners' brief as appellants in the St. Louis Court of Appeals, a certified copy of which accompanies this

Petition as part of the transcript again relied upon Amendment XIV, United States Constitution, as follows:

> "1. The Court erred in sustaining defendant Busch's motion to dismiss, because the predicate of the motion 'That the plaintiff failed . . . to state facts showing why plaintiffs failed to seek [shareholder] relief' was simply untrue.
>
> Gattesman v. General Motors Corporation, 268 F. 2d 194 (2d Cir., 1959);
> Merrill v. Davis, 159 Mo. 1191, 1201, 225 S. W. 2d 763 (Mo. Sup. 1950);
> Rule 52.08 (b), Missouri Rules of Civil Procedure;
> Crawford, Earl T., Class Actions under the Missouri Code, 18 Kansas City Law Review 103 (Apr. 1950), quoted V. A. M. S., § 507.070, page 364;
> V. A. M. S., §§ 351.310, 351.360 (Mo. R. S. 1959);
> Rule 67.05, Missouri Rules of Civil Procedure;
> United States Constitution, Amendment XIV;
> Missouri Constitution, Article I, Section 10" (Appellants' Statement, Brief and Argument II).

On September 21, 1965, the St. Louis Court of Appeals affirmed the dismissal with prejudice of Count II, and on October 20, 1965, overruled petitioners' Motion for Rehearing or to Transfer Cause to the Supreme Court of Missouri. Petitioners then filed in the Supreme Court of Missouri their Motion to Transfer and Suggestions in Support, a certified copy of which accompanies this Petition as part of the transcript. The Motion posed the questions:

> "1. Whether, in ruling that *it is necessary* in a derivative shareholders' action under Civil Rule 52.08 (b) (Op. 8) for restitution of excessive compensation (Op. 7) granted to its President, Board Chairman and Chief Executive Officer, by a Board of Directors under

his influence and control (Op. 4, 5), that plaintiffs *'submit their grievance to the body of stockholders before bringing this action'* (Op. 21) the Court of Appeals has failed to follow the following last controlling decisions of the Supreme Court which hold that the body of shareholders of a corporation as such have no power by resolution to determine what is reasonable compensation of officers employed by their Board of Directors, nor to file suit to recover an excess.

Merrill v. Davis, 359 Mo. 1101, 225 S. W. 2d 763;
Santa Fe Hills Golf and Country Club v. Safehi Realty Co., 149 S. W. 2d 27;
Leggett v. Missouri State Life Ins. Co., 342 S. W. 2d 833.

"2. Whether, in *thus requiring an impossibility* of plaintiff as a requisite to this type of action, the Court of Appeals has deprived plaintiffs and the nominal defendant of due process of law and the equal protection of the laws under U. S. Constitution Amendment XIV, and of equal rights and opportunity under the law and of due process of law under Art. I §§ 2 and 10, Constitution of Missouri." (Motion to Transfer and Suggestions in Support 2-3; Emphasis in original).

The Motion to Transfer was overruled on December 13, 1965.

On March 11, 1966, petitioners filed, and this Court sustained, their Application for Extension of Time Within Which to File Petition for Writ of Certiorari. The Application stated:

"While petitioner did rely upon Amendment XIV, Const. U. S., in support of its claim to the right to discover the true facts and to be heard on the merits

in its brief in the appeal of this case, nevertheless under then published relevant opinions of the U. S. Supreme Court, it did not appear sufficiently likely that this Court would entertain a petition for certiorari to review the Missouri judgment of dismissal. However, the **Surowitz** opinion announces that the right of a minority shareholder to establish by discovery facts necessary to support the requirements of the rule in a shareholder's derivative action brought in good faith, is a part of 'an honest and fair judicial system', and it, therefore, appears, in the light of **Surowitz**, that the right may indeed be one federally protected under the due process clause of U. S. Constitution Amendment XIV, as requiring an 'honest and fair judicial system' not only of the Federal Government, but also of the States themselves." (Application 3).

ARGUMENT.

I.

In **Merrill v. Davis**, 359 Mo. 1191, 1201, 225 S. W. 2d 763, 768 (1950), the Supreme Court of Missouri held as follows:

> "The control of litigation and the decision to litigate or not is in the directors, and, until they improperly fail or refuse to sue or defend in the corporate name, the stockholders cannot do so, and then must sue in right of the corporation in equity making a case of wrongful refusal to sue."

In **Santa Fe Hills Golf & Country Club v. Safehi Realty Company**, 349 S. W. 2d 27, 34 (1961), the Supreme Court of Missouri held as follows:

> "Where the management and control of a corporation is vested by statute and the corporate bylaws in the board of directors, the board's action with respect to the affairs of the corporation is controlling and exclusive, and the shareholders are without lawful authority to control the directors in the exercise of the judgment vested in them."

See, also, to the same effect, **Leggett v. Missouri State Life Insurance Company**, 342 S. W. 2d 833, 851 (1960).

The St. Louis Court of Appeals did consider petitioners' contention that, in light of these decisions, it was beyond the power of the stockholders as a body to recover excessive compensation allegedly paid to Mr. Busch (Appendix to this Petition pp. 30-33, Op. 18-22, 396 S. W. 2d 18-21). Then, in the face of the above decisions of the Supreme Court of Missouri holding that only the Board of Directors could institute litigation in behalf of the corporation, and in total disregard of petitioners' argument that

ratification was the very antithesis of "such actions as he desires [they desire]", the St. Louis Court of Appeals held that "the stockholders have the right to consider the matter and **ratify**, if they wish, any act of the directors, provided the act is not ultra vires, illegal or fraudulent (Appendix p. 33, Op. 21, 396 S. W. 2d 21), and affirmed the dismissal because petitioners had not sought ratification of what they were objecting to.

By thus retroactively reducing the right to institute a stockholder's derivative suit in a matter where the stockholders cannot act as a body to nothing more than the right to seek stockholder ratification of the very acts complained of, the St. Louis Court of Appeals has denied petitioners due process of law.

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. [Citing authorities] . . . When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" **Bouie v. City of Columbia**, 378 U. S. 347, 354, 84 S. Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964).

II.

On March 7, 1966, this Court decided **Surowitz v. Hilton Hotels Corporation**, 34 Law Week 4196, 86 S. Ct. 845. **Surowitz** held that the verification requirement of Rule 23(b), F. R. C. P., does not compel summary dismissal of a stockholder's derivative suit merely because the complaining

stockholder did not in fact understand the legal relationships or business transactions alleged in her complaint.

The St. Louis Court of Appeals held that the reasons alleged by petitioners for not seeking relief fom the stockholders were insufficient (Appendix p. 34, Op. 23, 396 S. W. 2d 21). The Court identified as the "principal inadequacy" of the Petition the failure to allege "that the defendant Busch and the board of directors owned or controlled the majority of the shares of the stock of the nominal defendant . . ." (Appendix p. 42, Op. 32, 396 S. W. 2d 25). Thus, the St. Louis Court of Appeals has held, apparently for the first time in any State or Federal Court, that the only acceptable "reasons for not making such effort", i. e., "to secure . . . if necessary, from the shareholders, such action as he desires" under Missouri Rule 52.08(b), which is verbatim in this respect with Federal Rule 23(b), is ownership or control by the individual defendant and his controlled Board of Directors of a majority of stock. Such a holding not only ignores common knowledge of modern corporate life, that control of a majority of stock is not necessary to control a large publicly held corporation. The more important effect of such a holding is that, in allowing only a single reason for not seeking stockholder relief, it effectively denies petitioners a hearing.

> "Rule 23(b) was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing

to betray their company's interest in order to enrich themselves." **Surowitz v. Hilton Hotels Corporation,** 34 Law Week 4196, 4198, 86 S. Ct. 845, 850.

Rule 52.08(b), which is identical in the respect here under consideration to Rule 23(b), must be considered as having an identical purpose. Yet, it has here been construed to deny a hearing upon the merits to very substantial stockholders, and solely because, as petitioners agree, they cannot allege that Mr. Busch and the directors own and control an actual majority of the stock of a corporation which had 16,024 stockholders as of November 30, 1962 (Stip. Par. 2(O)). In **Surowitz,** this Court held:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules was written to further, not defeat the end of justice." 34 Law Week 4196, 4198-9, 83 S. Ct. 845, 851.

The basic purpose stated is not only the basic purpose of the Federal Rules, it is the basic purpose of the due process clause of Amendment XIV.

If the dismissal of Surowitz's bona fide complaint through procedural booby traps without an adjudication of the merits is not the working of "an honest and fair judicial system", then the similar dismissal of the Saighs' bona fide petition through procedural booby traps without a hearing, but *with* an adverse adjudication on the

merits, is even less the workings of "an honest and fair judicial system".

And if petitioners have been deprived of their rights by the working of a judicial system which is neither honest nor fair, be it Federal or State, they have been deprived of due process of law, which as American citizens they are entitled to under U. S. Constitution Amendment XIV.

CONCLUSION.

Wherefore, petitioners pray for the issuance of a writ of certiorari to the St. Louis Court of Appeals.

Respectfully submitted,

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Attorney for Petitioners.

Of Counsel:
HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100.

APPENDIX.

EXHIBIT A.

Opinion.

In the St. Louis Court of Appeals,
September Session, 1965.

Fred Saigh and Elizabeth Saigh,
(Plaintiffs) Appellants,
By Relation to Anheuser-Busch, Inc.,
a Corporation, Nominal Defendant
Under Rule 52.04 (a),

v.

August A. Busch, Jr.,
(Defendant) Respondent.

No. 31,884.

Appeal from the Circuit Court, City of St. Louis,
Hon. David J. Murphy, Judge.

Opinion Filed September 21, 1965.

This is a stockholders' derivative action. The petition before us for scrutiny is the second amended petition, as amended by plaintiffs, which is in two counts. The trial court, pursuant to Civil Rule 82.06, V. A. M. R., and to a stipulation signed by all the parties, ordered a separate trial of the issues raised under Count I and further ordered the judgment rendered under Count I, after hearing, to be deemed a final judgment for purposes of appeal within the meaning of § 512.020, R. S. Mo. 1959, Vol. 33, V. A. M. S. An appeal by plaintiffs from a judgment adverse to them on Count I of their second amended petition is pending in the Supreme Court of Missouri as Cause No. 50622.

The instant appeal before us is by plaintiffs from a judgment on Count II wherein the trial court sustained the motion of defendant August A. Busch, Jr., to dismiss Count II, and dismissed said Count II "with prejudice."

Following this ruling by the court plaintiffs filed a motion for leave to amend Count II of their second amended petition as amended by them and for a determination of the time within which such amendment shall be made. This motion for leave to amend was overruled.

This suit was instituted by Fred Saigh and Elizabeth Saigh as stockholders of Anheuser-Busch, Inc., as a class action against August A. Busch, Jr., an individual defendant, and Anheuser-Busch, Inc., a corporation, designated by plaintiffs as a nominal defendant under Civil Rule 52.04 (a). Count I of plaintiffs' action sought to set aside a sale by Anheuser-Busch, Inc., to defendant August A. Busch, Jr., of 26,121 shares of its common capital stock. It was alleged that the sale was made pursuant to an employee stock option contract between the corporation and August A. Busch, Jr.

The general nature of the allegations in Count II, which is the count before us for examination and decision, is that August A. Busch, Jr., as President of the nominal defendant, is receiving salary and perquisites which are excessive and not based on the reasonable value of his services as president of the corporation.

Defendant August A. Busch, Jr. (who will be referred to hereinafter as defendant Busch, and Anheuser-Busch, Inc., will be referred to hereinafter as the nominal defendant), by his motion to dismiss attacks the sufficiency of the allegations in Count II of plaintiffs' second amended petition and in support of his motion to dismiss states: "That the plaintiffs failed to allege in Count II of said Second Amended Petition that plaintiffs have sought re-

lief from the other shareholders of the nominal defendant, Anheuser-Busch, Inc., or to state facts showing why plaintiffs failed to seek such relief; that by reason thereof plaintiffs failed to state a cause of action against this defendant under said Count II." As we have said, the trial court sustained this motion and dismissed said Count II "with prejudice." This attack by defendant Busch and the action of the trial court requires an examination of the allegations contained in Count II of plaintiffs' petition. In the interest of clarity and for a better understanding of our ruling, we quote the pertinent parts of plaintiffs' petition related to Count II thereof:

"1. Plaintiffs are and have been since prior to January 1, 1954, the owners of shares of common stock of Anheuser-Busch, Inc., in the following amounts:

Fred Saigh ..... 30,000 shares
Elizabeth Saigh ..... 1,600 shares

"2. Defendant [Busch], is and at all times set out herein has been President of Anheuser-Busch, Inc., and since April 11, 1956, has been Chairman of the Board of Directors.

"3. It would be useless either to seek the relief called for in this second amended petition by application to the Board of Directors of the nominal defendant or to request of such Board or the officers the consent of Anheuser-Busch, Inc., to join as plaintiff in this action or to seek to enforce the rights set out herein which may properly be asserted by it; and it is therefore joined as a nominal defendant under Rule 52.04 (a), Missouri Rules of Civil Procedure.

"4. Plaintiffs bring this action for themselves and in behalf of the class of shareholders of the nominal defendant or so many thereof as are similarly situated to the plaintiffs. The plaintiffs were shareholders at

the time of each of the transactions of which they complain. The members of the class of plaintiffs are very numerous, and it would be impracticable to bring them all before this Court, and plaintiffs will fairly insure adequate representation of all.

"5. The nominal defendant, at the instance of the defendant, sold to defendant on July 29, 1960, 21,121 shares, and on August 8, 1960, 5,000 shares of the common stock of Anheuser-Busch, Inc., which had previously been authorized but unissued, without having first offered the same to the plaintiffs and other shareholders, proportionately, and at the price of $25.30 per share, whereas the known market value of such shares on said dates was $34.00.

* * * * * * *

"COUNT II.

"9. Plaintiffs reassert as a part of Count II the allegations of Paragraphs 1, 2, 3, 4 and 5 of Count I.

"10. The members of the Board of Directors of Anheuser-Busch, Inc., are selected for nomination and caused to be elected by defendant, and with respect to the compensation and perquisites of the defendant [Busch] and respecting the sale by the nominal defendant of shares of its stock to defendant [Busch] are and at all times mentioned herein have been influenced and controlled by him.

"11. Since January 1, 1954, the nominal defendant has rendered to him, and for him, and to and for members of his family and relatives, benefits in the form of salary, bonuses, stock purchase options, expense allowances not to be accounted for, reimbursements and payments vouchered by him, and by other employees at his direction, rentals, personal club dues and initiation fees, the provision of life insurance, retirement

annuity, yachts, private railroad cars, private automobiles, busses, residences, the use of theatre and stadium homes and enclosures, servants, legal and accounting services, materials and supplies, and in the expenditure of large sums of money in promoting and giving publicity to the name of the defendant, and in identifying him in the minds of the public with the ownership of properties and facilities of the nominal defendant and with the donations and benefactions of the nominal defendant, and, as plaintiffs verily believe, in other ways not known to them, in a total amount which is not known to the plaintiffs, and which plaintiffs cannot determine without an audit of the records of the nominal defendant and of the defendant; but which is far in excess of the reasonable value of defendant's services as President of the nominal defendant.

"12. The action desired by plaintiffs could not have been obtained from the shareholders of the corporation;

"(a) for the reason that such action is an action which under the law must be taken by the Board of Directors and is not within the power of shareholders as a body; and

"(b) for the further reason that it was and is impossible for the plaintiffs to secure the election by the shareholders of a different Board of Directors in an effort to obtain the action sought by the plaintiffs:

"i. because the members of the Board of Directors, and especially the individual defendant, as owners, as trustees, and as proxies, have the right to vote very large blocks of stock of the defendant;

"ii. because the Board of Directors and the individual defendant have access to and the use of the funds of the corporation for the purpose of soliciting

proxies in behalf of themselves and their own nominees as the management of the corporation, and the prestige which the incumbeney of their office gives them as management of the corporation, and thus effectively control the communications between the corporation and its very large number of, and constantly changing list of, shareholders;

"iii. because, notwithstanding repeated requests by individuals shareholders, the Directors of the corporation and the individual defendant have refused to register the stock of the corporation on any National Securities Exchange; and therefore the solicitation of proxies by the Directors and the individual defendant is not subject to the limitations of the proxy rules of the Securities and Exchange Commission.

"iv. because, by avoiding the necessity of compliance with the proxy rules aforesaid, the Board of Directors and defendant, Busch, escape disclosure to the shareholders of the information required by Schedule 14 A of said rules, including details of the perquisites and remuneration of the directors, including that of defendant Busch.

"v. because by avoiding the necessity of compliance with the proxy rules aforesaid, the Board of Directors and defendant, Busch, escape the necessity of mailing to shareholders opposition proxies and opposition proxy solicitation material, and the necessity of including propositions of minority shareholders in the proxy solicitation material paid for by the corporation, and the other requirements of the proxy rules designed to facilitate communication between stockholders respecting the necessity for such action as is sought in this matter.

"vi. because of the foregoing, and of the great cost and necessary ineffectiveness of a personal proxy so-

licitation at individual expense, in opposition to a management solicitation at corporate expense, especially without benefit of the proxy rules, it would be hopeless to achieve the action sought herein from the shareholders as a body.

"Wherefore, plaintiffs pray that defendant be required to account for all sums and the value of all benefits received by him, and that he repay to the nominal defendant the value of all benefits so received in excess of a reasonable salary as President of the nominal defendant, and that plaintiffs have their costs, including a reasonable attorney's fee, assessed proportionately against the interests of those benefited by this action, and for such other relief as to the court may seem meet and proper in the premises."

The motion to dismiss which the court sustained alleges that plaintiffs have failed to state a cause of action for the reason that plaintiffs failed to allege in Count II of their second amended petition as amended by them that they have sought relief from other shareholders of the nominal defendant, Anheuser-Busch, Inc., or to state facts showing why plaintiffs failed to seek such relief. In effect, the court's ruling found that plaintiffs failed to disclose a legal right to maintain the instant action. As pointed out, this is a class action instituted by plaintiffs pursuant to the provisions of Civil Rule 52.04 (a). Under said rule all persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants, however, subject to the provisions of Civil Rule 52.08. Under Civil Rule 52.08, subd. (b) it is provided:

"Secondary Action by Shareholders.—In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association re-

fuses to enforce rights which may properly be asserted by it, the petition shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. **The petition shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary, from the shareholders, such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort**'' (Emphasis ours.)

We now review what we consider to be the fundamental principles of law involved. The management and control of the property and business of a corporation is vested by § 351.310, R. S. Mo. 1959, 17 V. A. M. S., in the Board of Directors, and this has been a fundamental principle of our statutory corporate law for many years. Santa Fe Hills Golf and Country Club v. Safehi Realty Co., Mo., 349 S. W. 2d 27; Leggett v. Missouri State Life Insurance Co., Mo., 342 S. W. 2d 833; Merrill v. Davis, 359 Mo. 1191, 225 S. W. 2d 763; Helm v. Talmadge, Mo. App., 40 S. W. 2d 496. While directors are not regarded as trusfees in a strictly technical sense, they are considered in equity as bearing a fiduciary relation to the corporation and its shareholders. Merrill v. Davis, supra, l. c. 767, and authorities cited therein. Essentially, a corporation should be run for the benefit of its stockholders and not for that of its directors and officers, but no individual stockholder has the authority to take over the duties of corporate management. The management and control of the corporation being vested by statute in the board of directors, as we have pointed out, is not in the stockholders and the action of the board of directors in regard to the affairs of the corporation is controlling and exclusive and the stockholders cannot control the directors in the exercise of the judgment vested in them by the stat-

ute. The function of the board of directors is to exercise judgment and discretion which the court cannot do in their stead, Merrill v. Davis, supra. Where the act complained of consists in an exercise of the discretion reposed in the directors or stockholders acting as such through the power of the majority, a stockholder cannot sue, for such an exercise of discretion cannot constitute an actionable wrong to the corporation even if injurious to it, and this rule includes discretion to sue or not to sue. 13 Fletcher's Cyc., Corporations, § 5951, p. 439; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

If any or all of the directors perform improperly, the corporation itself is the proper party plaintiff to bring an action to recover any losses occasioned by the wrong. Helm v. Talmadge, supra. The control of the litigation and the decision to litigate is in the directors and, until they improperly fail or refuse to sue or defend in the corporate name. The stockholders cannot do so. In the event of the failure or refusal of the directors to litigate, then the stockholders may sue, however, it must be in right of the corporation, in which their petition and proof must make a case of wrongful refusal on the part of the directors to sue, Merrill v. Davis, supra.

As we have said, the primary authority to sue for corporate injuries is in the board of directors and managing officers. This is so because "in the eyes of the law the injury is to the corporation (i. e., to the stockholders collectively) and not to the stockholders individually." Schick v. Riemer, Mo. App., 263 S. W. 2d 51; Caldwell v. Eubanks, 326 Mo. 185, 30 S. W. 2d 976; Punch v. Hipolite Co., 340 Mo. 53, 100 S. W. 2d 878.

If it is necessary for a stockholder to bring a derivative action because the corporate management wrongfully refuses to do so, it is conducted by the stockholder as the representative of the corporation and in such action the corporation is the real party in interest and it is brought —

for the benefit of the corporation. Putnam v. Juvenile Shoe Corporation, 307 Mo. 74, 269 S. W. 593. If a money judgment is awarded, it must be paid to the corporation.

If a stockholder brings a derivative action in behalf of the corporation it is a settled principle of equity jurisprudence and, we add a requirement of Civil Rule 52.08 (b), that before a court will entertain such an action and inquire into wrongs complained of by the stockholder, the stockholder must show that he has no other avenue of recovery and this can be done only on a showing that he has exhausted all remedies and reasonable efforts within the corporation. This principle was stated by our Supreme Court in Punch v. Hipolite Co., supra (100 S. W. 2d, l. c. 884), where it quoted from another opinion as follows:

> "'The stockholders would not be authorized to prosecute such action until they first exhausted all remedies within the corporation, unless the facts were such that it would be futile for them to make any effort to obtain relief through corporate channels.' Caldwell v. Eubanks, 326 Mo. 185, 30 S. W. (2d) 976, 979, 72 A. L. R. 621; Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001; Kirrane v. Boone, 334 Mo. 558, 66 S. W. (2d) 861. In order, therefore, to maintain the action, the individual stockholder must allege, and the proof show, either, that he has made demand upon the board of directors to take remedial action on behalf of the corporation and **that effort failing that he unsuccessfully sought action by the stockholders as a body, or a state of facts from which it appears that such demand or effort within the corporation and through corporate channels would have been futile and unavailing.** Caldwell v. Eubanks, supra, and cases there cited." (Emphasis ours.)

A landmark case frequently cited in our Missouri decisions concerning stockholders' derivative actions is that

of Hawes v. Oakland, supra, wherein the court said at 104 U. S., l. c. 460-461:

> "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.
>
> "The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, * * *."

This is the predominant rule followed in all of our Missouri cases and in addition to the cases cited in the quotation taken from Punch v. Hipolite Co., supra, we also cite Ratermann Building & Contracting Co. v. Missouri Portland Cement Co., 347 Mo. 12, 145 S. W. 2d 422; Bailey v. State Farmers Mutual Casualty Co., Mo. App., 377 S. W. 2d 485, and Helm v. Talmadge, supra. For other cases within the Federal jurisdiction, wherein the rule was applied requiring stockholders in derivative ac-

tions to exhaust all reasonable efforts to remedy the grievance within the corporation before bringing the action, see Quirke v. St. Louis-San Francisco Railway Company, 277 F. 2d 705, and Heinz v. National Bank of Commerce in St. Louis, 237 F. 942.

While the rule stated above requires the stockholder who brings the derivative action to allege and show, if he failed with the directors, that he has made an honest effort to obtain action by the stockholders as a body and if this is not done, where it could not be done or that it was not reasonable to require it and would therefore be a futile act, the complaining stockholder need not make these allegations in his petition if his petition alleges that the officers and directors of the corporation violated the trust committed to them by perpetrating and doing ultra vires, illegal or fraudulent acts, because such acts cannot be ratified even by a majority of the stockholders. In such a situation equity will entertain an action for relief by a dissenting minority stockholder without first resorting or appealing to the stockholders as a body. Helm v. Talmadge, supra; Leggett v. Missouri State Life Insurance Co., supra; Putnam v. Juvenile Shoe Corporation, supra; Merrill v. Davis, supra; Slutzker v. Rieber, 132 N. J. Eq. 406, 28 A. 2d 525; Hawes v. Oakland, supra; Gottesman v. General Motors Corp., 268 F. 2d 194. Nor are allegations showing that a stockholder has made a demand upon the stockholders as a body necessary if the petition alleges a situation where the majority of the stockholders participated in the acts complained of, or, where the defendants sued are the holders of a majority of the shares, or other facts showing such a demand would be useless or futile. D'Oench v. Gillioz, 346 Mo. 179, 139 S. W. 2d 921; Punch v. Hipolite Company, supra; Schick v. Riemer, supra; In re Western Tool and Manufacturing Co., Gurney v. Massena et al., 142 F. 2d 404. In the situations just mentioned the minority stockholder would be without a

remedy if the courts of equity did not entertain his action. Therefore, it is necessary that a minority stockholder in his petition allege facts which make it clear that he cannot obtain redress through regular corporate action and his failure to so allege is fatal if he does not show that he has called upon the corporation and the body of stockholders to redress the wrong he complains of in his petition and been refused or, as said, show facts which would excuse such efforts. This is a settled principle of equity jurisprudence that a minority stockholder must comply with, because courts of equity cannot open their doors to every disgruntled or dissatisfied stockholder who has a grievance against the management of the corporation for the reason that courts of equity cannot assume the management of corporations or substitute their judgment for that of the directors and managing officers. Courts will not review or attempt to control the discretionary powers of the management or board of directors of a corporation in matters concerning the internal affairs within the business area of the corporation if the powers are fairly and honestly exercised. Leggett v. Missouri State Life Insurance Co., supra; Merrill v. Davis, supra; Putnam v. Juvenile Shoe Corporation, supra; Quirke v. St. Louis-San Francisco Railway Co., supra; Heinz v. National Bank of Commerce in St. Louis, supra.

We limit our consideration of the sufficiency of plaintiffs' petition to the question raised by the grounds stated in the motion to dismiss, namely, "that the plaintiffs failed to allege in Count II of said Second Amended Petition that plaintiffs have sought relief from the other shareholders * * * or to state facts showing why plaintiffs failed to seek such relief; * * *."

Applying the principles of law we have heretofore stated to the amended second amended petition of plaintiffs, it is to be seen that plaintiffs do not allege that they

sought the action desired by them from stockholders, therefore, in order to maintain their action plaintiffs must state facts sufficient to excuse their failure to obtain such action or show sufficient reasons for not making such effort. Civil Rule 52.08 (b). As we have said, this rule is the outgrowth of established equitable principles which have been cited heretofore and the rule must be construed in the light of its equitable origin.

The management of a corporation is in the directors and the establishment and fixing of remuneration and perquisites for officers and managerial duties normally and initially is in the board of directors and, as we have pointed out in this regard, such duties being in the business and management area, any decision by the board of directors in connection therewith is usually controlling and exclusive and the stockholders cannot control the exercise of the judgment vested in them, unless this judgment is exercised in an arbitrary and capricious manner or contrary to by-laws or majority stockholders' action.

The petition does not allege that the director or officers performed or perpetrated ultra vires, illegal or fraudulent acts. If it was alleged that they had, it would be unnecessary for plaintiffs to resort to the stockholders for their desired action, because, as we have pointed out, the majority of the stockholders could not ratify such acts. Also, plaintiffs' petition does not allege or show that a majority of the stockholders improperly participated in the setting of the remuneration and perquisites complained of or that they participated in any manner. The petition does not show that the defendant Busch controls or holds a majority of the shares of stock of the corporation; nor does the petition show any other facts which would lead to the conclusion that a demand for the desired action would be useless and futile. Plaintiffs' petition does not show that they endeavored to seek redress of

their complaint at regular meetings of the nominal defendant. Failing to allege such acts or facts, it becomes incumbent upon the plaintiffs to seek redress of their complaint from the body of the stockholders. This key must do, we think, because they have failed to allege that the other stockholders have refused to call upon the directors and management to bring this action. It may be that a majority of the stockholders do not feel that the remuneration and perquisites received by defendant Busch are excessive. In that event, to permit plaintiffs to prosecute this action would be calling upon the court to exercise its judgment for that of the directors and stockholders on a purely managerial question. This, as we have pointed out, courts will refuse to do. This need to apply to the stockholders collectively is but a showing required under the equitable principle that the stockholder must exhaust all remedies and reasonable efforts within the corporation. It was out of this equitable principle that Civil Rule 52.08 (b) was adopted, which rule, in turn, came to us from Federal Rule 23 (b). This rule, as stated in Cohen v. Industrial Finance Corporation, supra, owes its origin to equitable considerations and should be construed accordingly and any construction that would result in the emasculation of the equitable principle that stockholders must exhaust all remedies and reasonable efforts within the corporation should be avoided. There is nothing in the petition of the plaintiffs to show that an appeal to the stockholders in the matter complained of in plaintiffs' petition would be futile. There is no allegation or showing in the petition that defendant Busch or the directors control or hold the majority of the shares of stock of the nominal defendant. If defendant Busch or the board of directors do not, and we must assume that they do not in the absence of an allegation in plaintiffs' petition to the contrary, then it is within the power of the remaining stockholders to call upon the board of directors to bring

the action desired by the plaintiffs or they have it in their power to replace the board of directors, inasmuch as they would be the holders of the majority of the shares of stock of the nominal defendant. This is in keeping with the decisions of the Supreme Court of the State of Missouri, some of which we have cited, Punch v. Hipolite, supra.

Plaintiffs contend that since the action desired by them was the restitution of unreasonable compensation given to defendant Busch and since the setting of his compensation was within the management area of the board of directors and was beyond the statutory power of the stockholders, that they considered it not necessary to explain their failure to apply to the stockholders for redress. We do not agree with this position taken by the plaintiffs. It is true that in the first instance the prerogative of fixing officers' and managers' compensation is usually with the board of directors. Fry v. National Rejectors, Mo., 306 S. W. 2d 465. As we have heretofore said, where this prerogative is arbitrarily exercised, it becomes a fitting subject for action by the stockholders, subject to meeting the demands of Civil Rule 52.08 (b).

Frequently in some corporations the stockholders determine the general policy of remuneration for officers and directors. The implementation of the policy formulated is usually left to the officers and directors and, therefore, it is not unusual for stockholders to participate and have a deep interest in the formulation of remuneration policies. Frequently officers and other stockholders submit to fellow stockholders proposals concerning the remuneration policy of the corporation. This is on the theory that every stockholder has a relationship to the management of the corporation. This has been demonstrated in the cases.

In the case of Diamond v. Davis, 62 N. Y. S. 2d 181, one of the grievances in the complaints involved the com-

pensation of executives. As an illustration that the stockholders have a place in the consideration of compensation paid to officers the court said (l. c. 189): "If after full, free and frank disclosure the bonus plan is adopted or ratified by the majority of stockholders, it is usually binding on the minority."

In our state in the case of Putnam v. Juvenile Shoe Corporation, supra, which was a suit in equity by a minority stockholder to compel directors to restore to the corporate treasury moneys paid out as bonuses or deferred salaries to officers and employees of the corporation, the court said at (269 S. W. l. c. 597):

> "Courts will not substitute their judgment for that of the stockholders as to what is good business policy, or as to what is beneficial to the corporation, absent evidence of fraud upon minority stockholders."

The court held that the action of the directors in connection with the bonuses and salaries "was voidable, at most, and could be ratified by the stockholders" (269 S. W. l. c. 599). In the course of its opinion in the Putnam case the court cited authorities from other jurisdictions which held that the action of the directors in voting increased salaries and bonuses to their number could be ratified by the stockholders at a stockholders' meeting.

In the case of Schick v. Riemer, supra, decided by this court, plaintiffs as minority stockholders inter alia complained that the defendants voted excessive salaries and bonuses and committed other grievances. In the course of our opinion we said:

> "There are circumstances in which minority stockholders may institute and maintain a proceeding to compel restoration to the corporate treasury of corporate funds misapplied by the negligence or intentional wrongdoing of directors and officers of the

corporation. Before filing such action, however, they must apply for relief to the directorate **and to the stockholders, exhausting all remedies within the corporation.** See Section 507.070 subd. 2, R. S. Mo. 1949, V. A. M. S. (Civil Rule 52.08 (b))" (Emphasis and parenthesis ours) (263 S. W. l. c. 54).

In the case of Heinz v. National Bank of Commerce in St. Louis, supra, the sum sought to be recovered was in the nature of compensation paid to an official of the bank. The court said at 237 F. l. c. 948:

> "It is not shown that any attempt was made to bring the matter to the attention of the stockholders at this meeting and no showing is made why this was not done. The record does not show that any attempt was made to bring about action by the stockholders in regard to the matter, or to call it to their attention."

This case clearly stands for the proposition that stockholders do have the right to question the compensation paid to corporation officers and the right to approve or disapprove said compensation and such right is not beyond the power of the stockholders.

The matter of compensation and other perquisites paid to officers and directors is within the control or power of confirmation of the body of stockholders and any complaint in connection therewith must be brought to the attention of such stockholders for their action before a suit is brought. The stockholder is entitled as such to a certain degree of control in these matters because as a stockholder he contributes to the corporate enterprise.

Therefore, we agree with defendant Busch that one could scarcely imagine an issue which would be more properly subject to resolution within the walls of a corporation than the setting of an officer's compensation, es-

pecially where, as in the instant case, it is alleged that the board of directors is controlled by the defendant Busch. The authorities we have cited give support to our position that where the directors are charged to be under the influence of defendant Busch, the stockholders have the right to consider the matter and ratify, if they wish, any act of the directors, provided the act is not ultra vires, illegal or fraudulent. We rule that plaintiffs were under a duty to submit their grievance to the body of stockholders before bringing this action.

Plaintiffs in support of their contention cite the case of Gottesman v. General Motors Corporation, supra. However, a reading of that case indicates that the primary reason given for excusing the failure of plaintiffs to make demand on the stockholders was because the acts complained of by the plaintiffs had been found prior to the plaintiffs' suit to be illegal and ultra vires acts, namely, violations of the anti-trust laws by DuPont. As we have pointed out, under such circumstances even the majority of the stockholders of General Motors Corporation could not ratify such acts. Therefore, this authority is not relevant to the contention made.

Another contention made by the plaintiffs is that through the last amendment made by them they have stated the facts showing why they have failed to seek redress from the body of stockholders. They seem to contend that having stated some reasons why they failed to seek stockholders' relief, even though they are inadequate and not legally sufficient, that such reasons are a sufficient compliance with the rule and that they have stated "Why plaintiffs failed to seek stockholder relief." We agree with defendant Busch that it was necessary for plaintiffs to state legally cognizable reasons for their failure to seek relief from the other stockholders. Reasons other than those which make application to the other stockholders

unnecessary do not excuse failure to seek relief from them. Quirke v. St. Louis-San Francisco Railway Company, supra, l. c. 707. The rule, as we pointed out, requires plaintiffs to state with particularity the facts showing why they have failed to seek redress from the body of stockholders. It is obvious that the facts stated must be of sufficient legal import and reason as to show conclusively that a request made would be refused and, therefore, would be futile and useless. Where the facts alleged do not show conclusively that an appeal to the stockholders would be refused then such facts alleged must be deemed insufficient under the rule.

We hold, as we will later explain, that the reasons given by plaintiffs for not seeking stockholders' relief constitute an insufficient compliance with Civil Rule 52.08 (b) and, therefore, plaintiffs' petition failed to state a cause of action or, in the language of the Civil Code, failed to state a claim upon which relief may be granted.

The reasons given by plaintiffs appear in paragraph 12 and the subdivisions thereof, (a) (b) i, ii, iii, iv, v, vi. We have discussed the reason set out in paragraph 12 (a). The subsequent paragraphs contain alleged reasons why it is impossible for plaintiffs to secure the election by the shareholders of a different board of directors.

The reason given in 12 (b) i, concisely stated, is that the members of the board of directors and especially the individual defendant as owners, trustees and proxies have the right to vote very large blocks of stock. There is nothing in this allegation which would indicate that the defendant Busch or the board of directors own or control the majority of the shares of stock. It needs no elaboration or discussion to show that the holders of the majority of the shares control the election and selection of directors and, therefore, there is nothing contained in this reason which shows that the majority shareholders

do not control the election of a different board of directors. As we have said heretofore, unless the plaintiffs allege and show that defendant Busch and the board of directors control a majority of the shares of stock, it is incumbent upon plaintiffs to obtain from the shareholders the action they desire. Not to require the complaining stockholders to make demand on the holders of the majority of the shares would make corporations, both large and small, subject to constant harassment by holders of an infinitesimal amount of stock compared to the total shares outstanding. There is no validity to the argument contained in plaintiffs' reply brief, where they contend that even though a majority is for ratification that the minority may be heard in a court of equity. Again, we say, where the matter under consideration is one that calls for the business judgment of a board of directors or of the majority shareholders and if this judgment is exercised fairly and honestly courts will not interfere. The only time that a court of equity will interfere, as we have stated, is when the matter complained of is ultra vires, illegal, fraudulent and, therefore, cannot be ratified by a majority of the stockholders or where the business judgment is exercised unfairly and in a dishonest manner.

Paragraph 12 (b) ii gives as the reason for plaintiffs' inability to secure the election of a different board of directors that the present board and defendant Busch have access to funds for the purpose of soliciting proxies in behalf of themselves, and plaintiffs further state that defendant Busch and the board thus effectively control the communications between the corporation and its very large number of and constantly changing list of shareholders. There is no allegation that defendant Busch or the board of directors have prevented the plaintiffs from securing proxies. There is no allegation that the proxies have been fraudulently or illegally obtained or solicited and no allegation that the stockholders who

executed the proxies to the defendant Busch and the board of directors have not done so of their own free will and volition. Access to the list of stockholders, however large in number they may be, is readily available to the plaintiffs under the provisions of § 351.215, R. S. Mo. 1959, 17 V. A. M. S.

As shown in the editorial comment accompanying the aforesaid section of the statute, this section contains requirement for stock transfer books and also contains general provision for examination of books of company by any shareholder at all proper times under such regulations as may be prescribed by by-laws. Also, in this connection, § 351.255, R. S. Mo. 1959, 17 V. A. M. S., requires a stockholders' list to be on file 10 days previous to the annual shareholders' meeting with the address of and the number of shares held by each shareholder, which list for a period of 10 days prior to the annual meeting shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours.

The same course of conduct followed by defendant Busch and the board of directors in obtaining proxies, complained of by plaintiffs, is available to plaintiffs.

Paragraph 12 (b) iii states that it is impossible for plaintiffs to secure the election of a different board of directors because the directors and defendant Busch have refused to register the stock of the corporation on any National Securities Exchange, although requested by individual stockholders to do so, and that they, therefore, are not subject to the proxy rules and other rules of the Securities Exchange Commission. The following paragraph, subdivision iv, is related to subdivision iii, in that plaintiffs contend that the board of directors and defendant Busch escape disclosure to the shareholders of the details of the perquisites and remuneration of the

directors including that of defendant Busch. In this regard the details as to the perquisites and remuneration of the directors and defendant Busch are available to the plaintiffs through the exercise of their rights under the provisions of § 351.215, supra. Further, the complaints contained in subparagraphs iii and iv about the refusal to register the stock of the corporation on any National Stock Exchange are immaterial, because plaintiffs do not allege that this matter was brought before a stockholders' meeting for action and further, as defendant Busch stated in his brief, plaintiffs merely allege how much easier it would have been to challenge the judgment of a different board of directors in some other mythical situation. We agree with defendant Busch that it was not for plaintiffs to make the decision that the stock of the nominal defendant had to be listed on any exchange. The fact is that it is not so listed and the fact that it would be easier for plaintiffs to obtain proxies and, therefore, a new board of directors, if it was so listed, is merely posing a hypothetical situation and is not limiting the complaint to the facts surrounding the present corporate structure. Also, whether the stock should be registered on any National Securities Exchange is a matter to be decided by the holders of the majority of shares either through direct action at a stockholders' meeting or through ratification by the stockholders of such action taken by the board of directors. There is no allegation in plaintiffs' petition that the holders of a majority of the shares want registration of the stock or that plaintiffs ever urged registration at a stockholders' meeting.

The same can be said about subdivision v of paragraph 12 (b). It is pointed out by this court in passing that Secs. 12, 13 and 14 of the Securities Act of 1934, 15 U. S. C., Secs. 78 (l), 78 (m) and 78 (n) have been amended as of August 20, 1964. This amendment to the Securities

Exchange Act may make the provisions of the act applicable to the shares of the nominal defendant. However, it is not our purpose or jurisdiction to make any firm statement on this matter.

Finally, in paragraph vi it is contended that the great cost makes the solicitations of proxies hopeless and that a personal proxy solicitation would be ineffective. This same contention was made in the case of Quirke v. St. Louis-San Francisco Railway Company, supra, namely, "that the stockholders were numerous and widely scattered and that it would be expensive, time consuming and impossible to reach them" (277 F. 2d, l. c. 707). In that case the court held the allegations with reference to plaintiffs' failure to obtain relief within the corporation were quite inadequate and pointed to the case of Heinz v. National Bank of Commerce, supra, in support of its opinion.

The court in the case of Quirke v. St. Louis-San Francisco Railway Company, supra, also quoted from the case of Stone v. Holy Hill Fruit Products, 56 F. 2d 554, as follows:

> "* * * It is not alleged that there is any wrong combination of a majority of the stockholders, but only that they live at a distance, are ignorant of the situation, and send their proxies to the president. The plain remedy for that would be to seek another stockholders' meeting, after informing the other stockholders of the situation and asking them to withdraw their proxies and to attend. * * * The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter at issue" (277 F. 2d, l. c. 707, 708).

In the Quirke case the court in its opinion made this additional comment and quoted from another case:

> "What is said in Haffer v. Voit, supra [219 F. 2d 704] points out the inadequacy of the excuse offered by the plaintiff for not seeking redress through the stockholders. In the course of that opinion it is said [219 F. 2d 705]:
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> "'* * * plaintiffs made no earnest and honest effort to secure from the stockholders such action as they desired. Cf. Rule 23 (b), Rules of Civil Procedure, 28 U. S. C. A.; Long v. Stites, 6 Cir., 88 F. 2d 554; * * * plaintiffs' explanation that they made no effort to secure such action from the stockholders upon the ground, among others, that they were widely scattered and that there would be expense and delay incident to such demand, is legally insufficient'" (277 F. 2d, l. c. 707).

The size of the corporation and the delay and expense in circularizing stockholders widely scattered does not excuse the failure to seek action from the stockholders. Fletcher's Cyc., Corporations, Vol. 13, § 5964, p. 463. Plaintiffs in their brief say that they would elaborate on the allegations in their petition by showing that the shareholders in the nominal defendant corporation were as many as 10,867, and that they could allege that 4,816,218 shares were the number of shares involved and that because of the number of shareholders and shares involved they should be excused from resorting to the majority stockholders. We are aware that in some cases the courts have held that where there are a large number of stockholders in widely different locations that it was not necessary for the complaining stockholders to make a demand on the shareholders even though they did hold a majority of the shares of stock. However, there are many more decisions that hold to the contrary and we think are better reasoned

and require the complaining stockholders to make a demand on the holders of the majority shares of stock where there is no showing that to make such demand would be futile and useless. The court's action in sustaining the motion of defendant Busch to dismiss Count II of the petition was correct.

The final point relied on by plaintiffs that calls for consideration is the contention that the trial court erred in denying plaintiffs' leave, under Civil Rule 67.05, V. A. M. R., to amend their petition upon the sustaining of the motion to dismiss, because as plaintiffs say, they had a right to so amend under the rule or because under the circumstances it was an abuse of discretion to deny such leave. It will be recalled that we pointed out that the court dismissed Count II of plaintiffs' second amended petition as amended and did so "with prejudice," and that following its ruling plaintiffs filed a motion for leave to amend Count II of their second amended petition as amended by them and for a determination of the time within which such amendment shall be made and the court overruled this motion.

Civil Rule 67.05 reads as follows:

> "On sustaining a motion to dismiss a claim, counterclaim on cross-claim the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect; in which cases amendment shall be made promptly by the party in default."

Plaintiffs contend that the use of the word "shall" in the rule makes it mandatory upon the court to grant leave to amend, pointing out that the word "shall" in statutory

construction is mandatory. 80 C. J. S., Shall, p. 136. Plaintiffs also contend that this rule must be read in conjunction with Civil Rule 55.53 because it is in general accord with the admonition of that rule that "leave [to amend] shall be freely given when justice so requires." In their brief plaintiffs say: "We see in the new rule no room for judicial discretion. If the words mean what the words mean, the court **must** grant leave until the plaintiff is satisfied that he can amend no further to any use, or until the amendment be stricken as immaterial under Rule 55.35. Otherwise, the rule does not authorize a judgment of dismissal 'with prejudice,' such as was entered here, unless an amended petition not be filed within the time allowed." In making this contention that leave to amend is mandatory upon the court under Civil Rule 67.05 the plaintiffs have overlooked the word "freely." The use of the word "freely" clearly shows that the trial judge has discretion to grant leave to amend or to refuse it. In the case of Jones v. Williams, 357 Mo. 531, 209 S. W. 2d 907, l. c. 911, the Supreme Court in construing the language contained in what is now Civil Rule 55.53 said that the language "leave shall be freely given when justice so requires" merely directs the trial court to be liberal in granting leave to file amended pleadings. As pointed out by defendant Busch in his brief, the trial court must be liberal in its action, but the very concept of liberality connotes discretion. It is a legal discretion that must be exercised and one which is controlled and disciplined according to legal standards and reasoning. Pehle v. Beedle, Mo. App., 392 S. W. 2d 652, l. c. 657. If we were to accord to Civil Rule 67.05 the mandatory construction called for by plaintiffs, the plaintiffs could prevent the trial court from ever finally dismissing an insufficient petition, simply by repeatedly demanding the right to amend and filing some sort of amended petition within the time prescribed by the court. It is readily seen that such a construction could lead to the filing of

countless amended petitions, as defendant Busch has pointed out, simply by plaintiffs repeatedly demanding the right to amend after the last petition is found to be insufficient. The sole inquiry we are forced to make is to determine whether or not the trial court abused the discretion lodged in it by the rule.

An examination of the record reveals that plaintiffs' original petition was filed on May 7, 1963. On May 17, 1963, plaintiffs filed their first amended petition. On June 14, 1963, plaintiffs amended their first amended petition. Thereafter, on August 9, 1963, by leave of court, plaintiffs filed their second amended petition. On December 18, 1963, plaintiffs by leave of court amended Count II of their second amended petition by substituting three new pages. This amendment consisted primarily of the addition of paragraph 12 with the subdivisions (a) (b) and i, ii, iii, iv, v, vi. After the court sustained the motion of defendant Busch to dismiss Count II of plaintiffs' second amended petition as amended, plaintiffs again, as we pointed out, asked leave to further amend their petition and asked the court to determine the time within which such amendment should be made. This last motion was the fifth attempt by plaintiffs to meet the inadequacies of their petition.

The trial court when ruling on the motion to dismiss was aware of the many amendments made by plaintiffs to their petition and, no doubt, felt, as we do, that if plaintiffs could amend the petition to supply the principal inadequacy, namely, that the defendant Busch and the board of directors owned or controlled the majority of the shares of the stock of the nominal defendant they would have done so. Such an allegation if made would show that it would be futile and useless for plaintiffs to seek from the other stockholders the relief plaintiffs desired. Plaintiffs were represented by capable and competent counsel who,

no doubt, knew that an allegation that defendant Busch and the board of directors owned and controlled the majority of the shares would have effectively excused plaintiffs' failure to seek relief from the other stockholders. No doubt, the trial court felt that the plaintiffs could not further amend their petition to meet the inadequacy we have outlined. Plaintiffs' inability to make this allegation can also be inferred from their briefs, wherein they allege that if permitted to amend they could have supplanted the allegation of "very large number of * * * shareholders" with the allegation that there was as many as 10,867 shareholders holding 4,816,218 shares of stock. Such an amendment would add nothing to plaintiffs' petition, inasmuch as said plaintiffs would continue to fail to meet the inadequacy and defect we have outlined. We cannot say that the trial court abused its discretion in dismissing plaintiffs' second amended petition as amended by them with prejudice.

The judgment of the trial court should be affirmed. It is so ordered.

E. M. Ruddy,
E. M. Ruddy, Judge.

John J. Wolfe, Presiding Judge, Concurs.

William E. Buder, Special Judge, Not Participating.

EXHIBIT B.

Judgment.

State of Missouri, } ss.
City of St. Louis. }

In the St. Louis Court of Appeals.

September Session, 1965.

Tuesday, September 21, 1965

Fred Saigh and Elizabeth Saigh,
Appellants,

By Relation to Anheuser-Busch, Inc., a Corporation, Nominal Defendant Under Rule 52.04 (a),

vs. Circuit Court of the City of St. Louis, No. 55,225-E, Div. No. 2.

August A. Busch, Jr.,
Respondent.

} No. 31,884.

Now again come the parties aforesaid, by their respective attorneys, and the Court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court of the City of St. Louis be affirmed and stand in full force and effect. Opinion by E. M. Ruddy, Judge, and concurred in by John J. Wolfe, Presiding Judge, filed. William E. Buder, Special Judge, not participating.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1178.

FRED SAIGH and ELIZABETH SAIGH, by Relation to ANHEUSER-BUSCH, INC., a Corporation,
Petitioners,

vs.

AUGUST A. BUSCH, JR.,
Respondent.

OPPOSITION BRIEF

Of Respondent, August A. Busch, Jr.

MARK D. EAGLETON,
THOMAS F. EAGLETON,
ALBERT J. STEPHAN, JR.,
818 Olive Street,
St. Louis, Missouri 63101,
GArfield 1-3100,
Attorneys for Respondent,
August A. Busch, Jr.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Nature of the Case	1
Opinion Below	5
Question Presented	7
Reasons for Denying the Writ:	
I. The recent decision by this Court in the case of Surowitz v. Hilton Hotels Corporation (1966), 34 Law Week 4196, in no way modifies the salutary requirements of the rule that absent fraudulent, ultra vires or illegal acts, intra corporate redress must be sought by a minority stockholder dissatisfied with an exercise of business judgment before instituting litigation attacking it	8
II. Petitioners' right to due process was not violated by judicial application of Rule 52.08 (b) of the Supreme Court of Missouri, which is identical to a statute of Missouri, Section 507.070, requiring that, as a prerequisite to maintaining this derivative action, they must show that they have exhausted all means of intra corporate redress available to them. Petitioners failed and refused to present the issue of propriety of respondent's compensation to the body of the stockholders. The majority of said stockholders has rights at least equal to those of the petitioners under the Due Process Clause	9
Conclusion	17
Appendix:	
1. Stipulation of Facts	19
2. Exhibit G to Stipulation	23
3. Exhibit H to Stipulation	25

Table of Cases.

Caldwell v. Eubanks (1930), 326 Mo. 185, 30 S. W. 2d 976, 72 A. L. R. 621 ..... 14, 15
Cohen v. Beneficial Industrial Loan Corporation (1949), 337 U. S. 541 ..... 11, 17, 18
Hawes v. Oakland (1881), 104 U. S. 450 ..... 13, 15
Leggett v. Missouri State Life Insurance Company (1960), 342 S. W. 2d 833 15
Merrill v. Davis (1950), 359 Mo. 1191, 225 S. W. 2d 763 15
Quirke v. St. Louis-San Francisco Railway Co. (8th Cir., 1960), 277 F. 2d 705, 707, cert. den. 363 U. S. 845 11
Santa Fe Hills Golf & Country Club v. Safehi Realty Company (1961), 349 S. W. 2d 27 15
Schick v. Riemer (Mo. App., 1954), 263 S. W. 2d 51 15
Surowitz v. Hilton Hotels Corporation (1966), 34 L. Wk. 4196 ..... 8, 9, 17

Table of Statutes.

Constitution of the United States, Amendment XIV ...7, 17
Rule 52.08 (b), Supreme Court of Missouri 9, 13, 15
Section 507.070, R. S. Mo. 1959 .....9, 15

IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.

AUGUST A. BUSCH, JR.,
Respondent.

OPPOSITION BRIEF

Of Respondent, August A. Busch, Jr.

NATURE OF THE CASE.

The plaintiffs (petitioners here) filed their suit in the Circuit Court of the City of St. Louis on May 7, 1963, which was at least 9 years and 4 months after the purchase of their stock of the nominal defendant Anheuser-Busch, Inc., on or about January 1, 1954. The suit was filed in two counts referred to as Count I and Count II. Count I was tried on its merits and submitted to the Court for final adjudication on October 8, 1963. Count I is not involved in this Petition for Writ of Certiorari, having been severed for purposes of trial and appeal (Tr. 36-36a).

The stipulation of facts upon which Count I was tried was thereafter by agreement of counsel made a part of

the record in Count II. (Supplemental Transcript of Record filed by Petitioners with Clerk.) Portions of said stipulation pertinent hereto are appended herein as Appendix 1. Exhibit G to said stipulation is included as Appendix 2. Exhibit H thereto is included as Appendix 3.

Petitioners, in their application for extension of time within which to file their petition (p. 3), suggest that the Court take judicial notice of the present value of their stock. They do so in this manner:

> "... if the Court will take notice of published bid and asked quotations on this stock, has a market value in excess of $3,000,000.00."

In view of the above statement, which is substantially correct, we believe the detail of the figures involved may be of interest. The 31,600 shares owned by the petitioners on January 1, 1954 (Paragraph 1, Plaintiffs' Second Amended Petition, Petitioners' Exhibit A, p. 17), have been subject to a stock dividend and a stock split as follows:

April 28, 1965.....2 for 1 Stock Split
October 27, 1965.....10% Stock Dividend

Hence, the said 31,600 shares are now the equivalent of 69,520 shares.

Exhibit H to the stipulation made a part of the Count II record as aforesaid shows the low and high for the stock in 1953 to have been 23½ and 34, respectively. Hence, petitioners' initial investment for the said 31,600 shares would have been between a minimum of $742,600.00 and a maximum of $1,074,000.00. The same shares (now 69,520), based on the March 10, 1966 published bid price (46⅝), would have a value of $3,241,370.00.

Count II, which is the subject matter of the Petition for Writ of Certiorari, alleged that the compensation and perquisites received by the respondent August A. Busch, Jr., the President and Chairman of the Board of the

nominal defendant Anheuser-Busch, Inc., and its chief executive officer, were "far in excess of the reasonable value of defendant's services as President of the nominal defendant" (Paragraph 11 of Plaintiffs' Second Amended Petition, Exhibit A, p. 19 of Petition herein [hereafter referred to as Exhibit A]; Tr. 27).

In addition to the foregoing charge, the plaintiffs alleged that the members of the Board of Directors of said Anheuser-Busch, Inc., are selected and nominated by the defendant and, in respect to said compensation and perquisites of the defendant (Busch), are influenced and controlled by him (Paragraph 10 of Plaintiffs' Second Amended Petition, Exhibit A, p. 18; Tr. 26). These allegations were denied by the defendant corporation (Tr. 34).

The answer of defendant August A. Busch, Jr., alleged in paragraph 13 (Tr. 46) that the action was not brought in good faith for the benefit of the corporation or its shareholders, but rather in a malicious effort to discredit defendant Busch, the corporation, and the members of the board of directors (Tr. 46).

Within a month after filing their suit, plaintiffs filed a motion to inspect the income tax returns of defendant August A. Busch, Jr., for the years 1955 through 1962, as well as any correspondence with the Internal Revenue Service respecting "claimed amounts of income not included in any such return, or respecting disputed claims for business expenses" (Tr. 15).

On July 12, 1963, the trial court sustained the motion; and, on July 17, 1963, modified its order so as to require defendant Busch to "make available for examination by plaintiffs, their counsel and auditors, . . . such portions of the income tax returns of the defendant August A. Busch, Jr., for the calendar years 1954 to 1962, inclusive, as relate to: (1) wages, salaries, bonuses, commissions and expense account allowances or reimbursed expenses re-

ceived by him from any employer, (2) rental income and expenses in connection with the production thereof, (3) farm income and expenses, and (4) income from sources other than capital gains, dividends, interest, annuities, estates and trusts, and such portions of any correspondence between the Internal Revenue Service of the United States and said defendant, or anyone representing him, if any, respecting claimed amounts of any such items of income not included in any such return, or respecting disputed claims for business expenses . . ." (Tr. 22-23).

The records were accordingly made available to the plaintiffs and their counsel.

Thereafter the plaintiffs were permitted to make four amendments, on four different occasions, to their original petition (Exhibit A, p. 42). Defendant Busch refiled his said answer, containing the affirmative defenses aforementioned and filed a motion to dismiss plaintiffs' second amended petition as amended (Tr. 48, 56) on the ground that it failed to show that petitioners had submitted their grievances to the body of the stockholders or to give legally cognizable reasons for not doing so.

On December 18, 1963, said motion of defendant August A. Busch, Jr., to dismiss plaintiffs' second amended petition as amended was argued by respective counsel and submitted to the court (Tr. 57).

On January 20, 1964, the Court sustained said motion of defendant August A. Busch, Jr., to dismiss Count II of plaintiffs' second amended petition as amended and dismissed Count II with prejudice (Tr. 58).

Thereafter, on January 30, 1964, plaintiffs filed a motion for new trial as to Count II (Tr. 62). After it was duly considered and overruled, plaintiffs appealed to the St. Louis Court of Appeals and that court affirmed the decision of the trial court on September 21, 1965. Petitioners' motion for rehearing or to transfer cause to the

Supreme Court of Missouri was subsequently overruled. Petitioners then filed in the Supreme Court of Missouri their motion to transfer and suggestions in support thereof. Said motion to transfer was overruled by the Supreme Court of Missouri on December 13, 1965.

Petitioners have filed with the Clerk of this Court a certified copy of their brief in the St. Louis Court of Appeals and make reference thereto in their petition (pp. 7-8). Respondent has lodged with the Clerk a certified copy of each brief filed by respondent in the St. Louis Court of Appeals, but no reference is made to same herein.

On March 11, 1966, petitioners filed, and this Court sustained, their application for extension of time within which to file their petition for the Writ of Certiorari.

OPINION BELOW.

The opinion of the St. Louis Court of Appeals is reported at 396 S. W. 2d 9. A copy of the opinion is appended to the Petition for Writ of Certiorari found at pages 15 through 43 thereof marked as Exhibit A.

For the convenience of the court and in order to present this matter in sequence, we herewith quote a few of the pertinent statements contained in said opinion:

> "If a stockholder brings a derivative action in behalf of the corporation it is a settled principle of equity jurisprudence and, we add a requirement of Civil Rule 52.08 (b), that before a court will entertain such an action and inquire into wrongs complained of by the stockholder, the stockholder must show that he has no other avenue of recovery and this can be done only on a showing that he has exhausted all remedies and reasonable efforts within the corporation" (Exhibit A, p. 24; 396 S. W. 2d, l. c. 16).

* * * * * * *

"This is the predominant rule followed in all of our Missouri cases and in addition to the cases cited in the quotation taken from Punch v. Hipolite Co., supra, we also cite Ratermann Building & Contracting Co. v. Missouri Portland Cement Co., 347 Mo. 12, 145 S. W. 2d 422; Bailey v. State Farmers Mutual Casualty Co., Mo. App., 377 S. W. 2d 485, and Helm v. Talmadge, supra. For other cases within the Federal jurisdiction, wherein the rule was applied requiring stockholders in derivative actions to exhaust all reasonable efforts to remedy the grievance within the corporation before bringing the action, see Quirke v. St. Louis-San Francisco Railway Company, 277 F. 2d 705, and Heinz v. National Bank of Commerce in St. Louis, 237 F. 942.

"While the rule stated above requires the stockholder who brings the derivative action to allege and show, if he failed with the directors, that he has made an honest effort to obtain action by the stockholders as a body and if this is not done, where it could not be done or that it was not reasonable to require it and would therefore be a futile act, the complaining stockholder need not make these allegations in his petition if his petition alleges that the officers and directors of the corporation violated the trust committed to them by perpetrating and doing ultra vires, illegal or fraudulent acts, because such acts cannot be ratified even by a majority of the stockholders. In such a situation equity will entertain an action for relief by a dissenting minority stockholder without first resorting or appealing to the stockholders as a body" (Exhibit A, pp. 25-26; 396 S. W. 2d, l. c. 17).

* * * * * * * *

"The petition does not allege that the directors or officers performed or perpetrated ultra vires, illegal or fraudulent acts. If it was alleged that they had,

it would be unnecessary for plaintiffs to resort to the stockholders for their desired action, because, as we have pointed out, the majority of the stockholders could not ratify such acts. Also, plaintiffs' petition does not allege or show that a majority of the stockholders improperly participated in the setting of the remuneration and perquisites complained of or that they participated in any manner" (Exhibit A, p. 28; 396 S. W. 2d, l. c. 18-19).

* * * * * * *

"Failing to allege such acts or facts, it becomes incumbent upon the plaintiffs to seek redress of their complaint from the body of the stockholders. This they must do, we think, because they have failed to allege that the other stockholders have refused to call upon the directors and management to bring this action. It may be that a majority of the stockholders do not feel that the remuneration and perquisites received by defendant Busch are excessive. In that event, to permit plaintiffs to prosecute this action would be calling upon the court to exercise its judgment for that of the directors and stockholders on a purely managerial question. This, as we have pointed out, courts will refuse to do. This need to apply to the stockholders collectively is but a showing required under the equitable principle that the stockholder must exhaust all remedies and reasonable efforts within the corporation. It was out of this equitable principle that Civil Rule 52.08 (b) was adopted, which rule, in turn, came to us from Federal Rule 23 (b)" (Exhibit A, p. 29; 396 S. W. 2d, l. c. 19).

QUESTION PRESENTED.

Is the Federal Constitutional guarantee of due process violated by a decision of a state court which enforces a state statute and an identical rule of its highest court

requiring that, in a stockholder's derivative suit, a minority stockholder, before attacking an exercise of business judgment by corporate management, must show, in the absence of fraudulent, ultra vires, or illegal acts, that, having failed with the directors, the derivative suit plaintiff has made an honest effort to obtain the desired action from the stockholders as a body or, if this is not done, that there are legally cognizable reasons for his failure to make such effort?

REASONS FOR DENYING THE WRIT.

I.

The recent decision by this court in the case of Surowitz v. Hilton Hotels Corporation (1966), 34 Law Week 4196, in no way modifies the salutary requirements of the rule that absent fraudulent, ultra vires or illegal acts, intra corporate redress must be sought by a minority stockholder dissatisfied with an exercise of business judgment before instituting litigation attacking it.

The Surowitz opinion does not announce, as stated by the petitioners here, "the right of a minority shareholder to establish by discovery facts necessary to support the requirements of the rule in a shareholder's derivative action." (Petition, p. 9.) We cannot find any language in the Surowitz opinion that even faintly resembles such an enunciation.

As we understand the Surowitz decision, with which we have no quarrel whatsoever, it held in effect that the verification of the petitioner, supported as it was by two other affidavits based upon a prolonged and fruitful investigation, which had developed facts showing actual fraud and deception on the part of the respondents, was sufficient to entitle said petitioner to a trial on the merits. This Court, therefore, overruled the Court of Appeals

which had reached an opposite conclusion "despite the fact that the charges made against the defendants were viewed as very serious and grave charges of fraud and that 'many of the material allegations of the complaint are obviously true and cannot be refuted.' 342 F. 2d at 607" (34 L. W. 4196-4197).

The Surowitz case does not directly or indirectly touch the question involved here, to-wit, whether a dissident minority stockholder, on a purely managerial decision not involving charges of fraudulent, illegal or ultra vires acts, must submit his grievance to the body of the stockholders before calling upon the courts to substitute their judgment for that of the great majority of said stockholders.

II.

Petitioners' right to due process was not violated by judicial application of Rule 52.08 (b) of the Supreme Court of Missouri, which is identical to a Statute of Missouri, Section 507.070, requiring that, as a prerequisite to maintaining this derivative action, they must show that they have exhausted all means of intra corporate redress available to them. Petitioners failed and refused to present the issue of propriety of respondent's compensation to the body of the stockholders. The majority of said stockholders has rights at least equal to those of the petitioners under the due process clause.

Petitioners complain that their right to due process has been violated by the decision of the St. Louis Court of Appeals enforcing Rule 52.08 (b) of the Supreme Court of Missouri. Said Rule requires in part:

> ". . . The petition shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary, from the shareholders, such action as he desires, and

the reasons for his failure to obtain such action or the reasons for not making such effort."

Relying upon said rule and copious precedent, discussed more fully below, the St. Louis Court of Appeals held that, in the absence of fraudulent, ultra vires, or illegal acts, ". . . it is necessary that a minority stockholder in his petition allege facts which make it clear that he cannot obtain redress through regular corporate action and his failure to so allege is fatal if he does not show that he has called upon the corporation and the body of stockholders to redress the wrong he complains of in his petition and been refused or, as said, show facts which would excuse such efforts" (Exhibit A, p. 27; 396 S. W. 2d, l. c. 18).

Petitioners did, in their last amendment to their petition, assert irrelevant reasons for not seeking relief from the shareholders, i. e., (a) that the "action desired" was **not within the power of the shareholders** and (b) that petitioners could not secure the election of a new board of directors (Paragraph 12, Second Amended Petition, Exhibit A, pp. 19-21; 396 S. W. 2d, l. c. 14-15; Tr. 53-55).

Assigned "reason" (a) is in accordance with petitioners' contention from the outset that the majority of stockholders have no rights whatever to be informed or to be heard in this type of controversy. Assigned "reason" (b) begs the question entirely and sets up a strawman, to-wit, that petitioners, if they ever tried, would find it difficult, if not impossible, to elect a new board of directors. The issue here is whether a dissident stockholder, before filing a derivative action, absent fraudulent, illegal or ultra vires acts, must submit his grievance to the body of the stockholders whenever he contends that a board of directors has failed in its managerial responsibilities.

The court below thoroughly discussed the alleged "reasons" and subdivisions thereunder, forcefully demon-

strating the irrelevance of each (Exhibit A, pp. 33-40; 396 S. W. 2d, l. c. 21-24). Neither of the reasons thus assigned, nor any of the subdivisions, provides legally cognizable grounds for petitioners' failure to seek intra corporate redress and therefore could not operate to relieve petitioners of the requirement to obtain approval of the stockholders prior to attempting to maintain this action. See Quirke v. St. Louis-San Francisco Railway Co. (8th Cir., 1960), 277 F. 2d 705, cert. den. 363 U. S. 845.

The requirement of seeking intra corporate redress as a prerequisite to maintaining a suit of this nature is a reasonable exercise of the authority of a state to regulate the use of its adjudicating processes and to protect the rights of all other stockholders, for whom petitioners purport to speak. As such, the requirement cannot be held to violate the principle of due process.

In Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U. S. 541, this Court considered a relatively similar issue, i. e., whether due process was violated by a state statute which provided that a derivative suit plaintiff could be required to post security for the corporation's expenses in defending the suit.

The opinion, delivered by Mr. Justice Jackson, discusses the history of derivative suits and holds that due process is not violated by state statutes which regulate their maintenance. The following words of the Court are of particular import herein:

> "**The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers.** Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation,

either by public authority or by some form of stockholder action. Directors and managers, if not technically trustees, occupy positions of a fiduciary nature, and nothing in the Federal Constitution prohibits a state from imposing on them the strictest measure of responsibility, liability and accountability, either as a condition of assuming office or as a consequence of holding it.

"Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. It is not without significance that this Court has found it necessary long ago in the Equity Rules and now in the Federal Rules of Civil Procedure to impose procedural regulations of the class action not applicable to any other. **We conclude that the state has plenary power over this type of litigation" (337 U. S., l. c. 549-550).** (Emphasis added.)

* * * * * * *

"A state may set the terms on which it will permit litigations in its courts. No type of litigation is more susceptible of regulation than that of a fiduciary na-

ture. And it cannot seriously be said that a state makes such unreasonable use of its power as to violate the Constitution when it provides liability and security for payment of reasonable expenses if a litigation of this character is adjudged to be unsustainable" (337 U. S., l. c. 552). (Emphasis added.)

* * * * * * * *

"But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met" (337 U. S., l. c. 552).

* * * * * * * *

"**A plaintiff cannot avail himself of the New Jersey forum and at the same time escape the terms on which it is made available** . . ." (337 U. S., l. c. 554). (Emphasis added.)

Not only does Missouri Supreme Court Rule 52.08 (b) and its application in the opinion below fully comport with all requirements of due process, it is in complete accord with prior decisions of the Supreme Court of Missouri and this Court.

Indeed, the opinion of the St. Louis Court of Appeals was firmly grounded upon the rule of Hawes v. Oakland (1881), 104 U. S. 450, to which it referred and quoted from as follows:

"A landmark case frequently cited in our Missouri decisions concerning stockholders' derivative actions is that of Hawes v. Oakland, supra, wherein the court said at 104 U. S., l. c. 460-461:

'But, in addition to the existence of grievances which call for this kind of relief, it is equally important that **before** the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation,

> he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.
>
> 'The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, * * *'

"This is the predominant rule followed in all of our Missouri cases . . ." (Exhibit A, pp. 24-25; 396 S. W. 2d, l. c. 17). (Emphasis added.)

The leading case in Missouri on the aspect of derivative suits with which we are here concerned is Caldwell v. Eubanks (1930), 326 Mo. 185, 30 S. W. 2d 976, 72 A. L. R. 621, wherein a demurrer to such an action was sustained because plaintiffs had failed to allege that they had sought from the other stockholders the action they desired. In affirming the action upon the demurrer, the Supreme Court of Missouri said:

> "In cases where a stockholder fails to obtain corporate action through the board of directors, the general rule is that he should seek such action by the stockholders as a body, unless the facts be such that

he could not do so, or it would be unreasonable or useless to require it" (30 S. W. 2d, l. c. 979).

* * * * * * * *

"Courts will not lend a listening ear to dissatisfied stockholders and permit them to maintain a suit for the benefit of the corporation unless they show that they have exhausted all remedies within the corporation or furnish some valid reason why they have not done so. No such showing is made in plaintiffs' petition" (30 S. W. 2d, l. c. 980).

The rule of Hawes v. Oakland, supra, and Caldwell v. Eubanks, supra, was written into the statutes of Missouri by the Sixty Second General Assembly of Missouri in 1943 (Laws of 1943, p. 353, Sect. 19) in what is now Section 507.070. The Supreme Court of Missouri later promulgated Rule 52.08 which is identical to that section. The rule and statute have continued to govern the institution of derivative suits, as witness the words of the St. Louis Court of Appeals in Schick v. Riemer (1954), 263 S. W. 2d 51, 54:

"**Before** filing such action, however, they must apply for relief to the directorate and to the stockholders, exhausting all remedies within the corporation. See Section 507.070, subd. 2, R. S. Mo. 1949, V. A. M. S." (Emphasis added.)

Petitioners rely upon three Missouri cases, Merrill v. Davis (1950), 359 Mo. 1191, 225 S. W. 2d 763; Leggett v. Missouri State Life Insurance Co. (1960), 342 S. W. 2d 833; and Santa Fe Hills Golf & Country Club v. Safehi Realty Company (1961), 349 S. W. 2d 27 (Petition, p. 10). However, none of these cases involved an interpretation of Rule 52.08 (b) on the point in question, and we can find no case which supports the position taken by petitioners. On the contrary, the portion of Merrill v. Davis, supra, quoted by petitioners reflects the court's continuing recognition of the rule:

> " 'The control of litigation and the decision to litigate or not is in the directors, and, **until they improperly fail or refuse to sue or defend in the corporate name,** the stockholders cannot do so, and then must sue in right of the corporation in equity making a case of wrongful refusal to sue.' " (Emphasis added.)

Manifestly, the opinion below is not, as petitioners claim, "in the face of" prior decisions of Missouri appellate courts; nor does it espouse "for the first time" any principles of law not heretofore firmly established by this Court and the Courts of Missouri. The opinion below is an expression of a time honored and consistently recognized rule based upon an equitable balance of interests between the derivative suit plaintiff and **all other stockholders** who, if informed and consulted, might fully agree—or disagree—with the action of which the derivative suit plaintiff complains.

If the rule were otherwise, a derivative suit plaintiff could, after inspecting corporate records and the income tax returns of all individuals whose salaries are questioned (Tr. 15), and after employing formal interrogatories and taking depositions, adopt one of two courses: (1) he could dismiss the action, express his regrets, pay a nominal amount of court costs and walk away, or (2) he could ask the court to substitute its judgment for that of the directors, while the great body of the stockholders were entirely ignored and kept on the sidelines. Moreover, during this entire period, the corporation's reputation, policies, and good will, which are of vital economic interest to every corporation, would be under a cloud and subject to whatever doubts the plaintiff could create in the public mind through his allegations.

The protections of due process should and do extend not only to the petitioners herein but to the body of the stockholders as well. For they, too, have a right to be

consulted and to be heard on matters of business judgment if, as petitioners have alleged, the directors have improperly abandoned their managerial responsibilities. As the owners of the corporation, the body of the stockholders has the right to approve or disapprove the compensation paid to respondent. This is a right which reposes in them and not in the courts, until and unless those who would speak for the stockholders can show that they come into court with the approval of the holders of the majority of the stock.

A derivative suit plaintiff may be, as stated by Mr. Justice Jackson, supra, 337 U. S., l. c. 549, "a self-chosen representative and a volunteer champion . . ." It is a matter of fundamental fairness that those whom he would represent should be informed as to the nature of the grievance, that they should be given an opportunity to state whether in their business judgment, there is any wrong to be redressed and, if so, whether they want to depend upon such volunteer's "diligence, wisdom and integrity . . .", 337 U. S., l. c. 549, in the selection of the remedy and the prosecution thereof. Of course, if as in the Surowitz case, charges of fraudulent, illegal, or ultra vires acts were made, there would be no necessity for seeking the judgment of the body of the stockholders.

Petitioners have not been limited, as they claim, to seeking "ratification of the very acts complained of . . ." (Petition, p. 11). They simply have been required to show that they actually represent the will of the body of the stockholders.

CONCLUSION.

It is therefore respectfully submitted that the writ of certiorari should not be granted for the reason that no rights secured to the petitioners by the Federal Constitution were violated by the judgment of the St. Louis Court of Appeals in this case.

Unquestionably, a contrary holding would deprive the great body of stockholders in every large corporation of any opportunity to be informed or to have a voice in management decisions whenever as much as one dissident stockholder seeks to overrule the chosen legal representatives of the corporation—its directors. Chaos is certain to result if the statutory duties and responsibilities of the directors are thus automatically transferred to a self-appointed champion whenever he chooses to ignore the majority of the stockholders and to litigate managerial decisions without its advice and consent. He can then challenge the salaries, the methods of advertising, the processing of products, the purchase of equipment and of new plant locations, the corporate financial structure, etc. In short, the volunteer representative would then have the exclusive privilege of making whatever allegations came to his mind.

In Missouri no bond to protect corporate losses is mandatory as in the Cohen case, supra, nor is even a "verification" of the charges required as in Federal Rule 23 (b). In light of these circumstances, the ruling of the St. Louis Court of Appeals is not only reasonable but a very necessary requirement.

Respectfully submitted,

MARK D. EAGLETON,

THOMAS F. EAGLETON,

ALBERT J. STEPHAN, JR.,
Attorneys for Respondent,
August A. Busch, Jr.,
818 Olive Street,
St. Louis, Missouri 63101,
GArfield 1-3100.

APPENDIX 1.

(Caption Omitted.)

Stipulation.

It is stipulated by and between the plaintiffs, defendant Anheuser-Busch, Incorporated, and defendant, August A. Busch, Jr., through their counsel of record:

1. The Court may order a separate trial of Count I of the second amended petition and enter judgment thereon and specifically designate such judgment as a final judgment for purposes of appeal within the meaning of Section 512.020, R. S. Mo. 1959, pursuant to the provisions of Rule 82.06, Missouri Rules of Civil Procedure; but the judgment on Count I shall not foreclose the trial and determination of any of the issues arising under Count II of the petition.

2. The submission of the issues under Count I shall be solely upon the following facts, which for this purpose shall be taken to be true. The recital herein of any fact shall not preclude the comment of any party respecting the evidentiary or probative value thereof under the issues.

(A) Defendant, Anheuser-Busch, Incorporated, is, and at all times referred to herein has been, a corporation organized and existing under the laws of the State of Missouri. A true copy of the Articles of Incorporation and the Certificate of Incorporation of defendant, Anheuser-Busch, Incorporated, and all amendments thereto is hereto attached marked Exhibit A and made a part hereof.

(B) Plaintiffs have since January 1, 1954, been, and at the present time are, owners of shares of common stock of the defendant, Anheuser-Busch, Incorporated, in the following amounts:

Fred Saigh, ... 30,000 shares
Elizabeth Saigh, ... 1,600 shares

(C) The defendant, August A. Busch, Jr., became President and Chief Executive Officer of defendant, Anheuser-Busch, Incorporated on September 5, 1946, and has continuously performed the functions and duties of said offices from and since said date. On April 11, 1956, he became the Chairman of the Board of Directors of said corporation, and from and since the last mentioned date has continued to act as both the President and Chief Executive Officer of said corporation and the Chairman of its Board of Directors. At all times since December 7, 1926, he has been, and still is, a member of said Board of Directors.

* * * * * * * *

(N) Anheuser-Busch, Incorporated presently operates eight plants as follows: Brewery and corn products division at St. Louis, Missouri; Grain elevator at Springfield, Missouri, since 1925; Yeast plant at Old Bridge, New Jersey, erected 1931; Table syrup operation at New Orleans, Louisiana, beginning 1935 in leased facilities, with new plant erected 1960; Brewery at Newark, New Jersey, erected 1951; Brewery at Los Angeles, California, erected 1954; Brewery at Tampa, Florida, erected 1959; Malting facility at Manitowac, Wisconsin, purchased 1962. As of December 31, 1962, the company had 8501 employees. Anheuser-Busch, Incorporated, also owns the St. Louis National Baseball Club, Inc. (the St. Louis Cardinals) and Busch Stadium. Exhibit F, which is attached hereto and made a part hereof (reproduced from the Annual Report of defendant Anheuser-Busch, Incorporated for the year 1962) sets forth a ten year summary of the financial condition of the defendant Anheuser-Busch, Incorporated. Exhibit G which is attached hereto and made a part hereof (reproduced from the Annual Report of defendant Anheuser-Busch, Incorporated for the year 1962), sets

forth the sales, income and dividends, et cetera, of said defendant for the years 1933 to 1962, both inclusive.

(O) The number of shareholders of defendant Anheuser-Busch, Incorporated on July 5, 1955 (the record date for the August 2, 1955, shareholders meeting) was 10,867 and as of November 30, 1962, was 16,024. The high and low market prices of the shares of defendant Anheuser-Busch, Incorporated for the years 1952 to 1962, both inclusive, and for the period January 1, 1963 to May 1, 1963, were as set forth on the schedule hereto attached, marked Exhibit H and made a part hereof.

* * * * * * *

3. This stipulation shall be valid and binding from and after the date upon which the Judge of Division No. 3 of the Circuit Court of the City of St. Louis shall approve and sign the same; or if it shall not be approved within thirty days from the time of its execution, the stipulation shall be void in all respects.

Fred Saigh,
Elizabeth Saigh,
By Hocker, Goodwin & MacGreevy,
And /s/ Lon Hocker,
Lon Hocker,
Their Attorneys.

Anheuser-Busch, Incorporated,
By /s/ Harry W. Kroeger,
Its Attorney.

August A. Busch, Jr.,
By /s/ Mark D. Eagleton,
/s/ Roberts P. Elam,
His Attorneys.

Dated September 23rd, 1963.

ORDER.

The foregoing stipulation is approved. A separate trial of the issue under Count I is ordered and judgment when rendered thereon shall be deemed a final judgment for purposes of appeal within the meaning of Section 512.020, R. S. Mo. 1959.

Dated September 24, 1963.

/s/ David J. Murphy,
Circuit Judge.

Saigh v. Busch
No. 55225-E
Exhibit G to
Stipulation
on Count I

APPENDIX 2

SALES, INCOME, DIVIDENDS, EARNINGS REINVESTED, DEPRECIATION and PAYROLLS

	Barrels	Net Sales	Income Before Taxes	Earnings	Earnings Per Share	..Dividends Paid.. §Shares Outstanding	Per Share	Earnings Reinvested	Depreciation Charged to Operations	Direct Payroll
1933	607,511	$ 15,049,833	$ 457,251	$ 325,529	$ 1.81	180,000	$ 3.00‡		$ 975,821	NA
1934	1,093,223	16,843,719	1,083,704	907,767	5.04	180,000	1.00	$ 727,767	1,152,746	NA
1935	1,135,776	17,223,306	1,049,258	891,918	4.96	180,000	1.00‡	486,918	1,207,543	$ 5,576,000
1936	1,376,692	21,150,154	3,715,984	3,041,653	16.90	180,000	12.00	881,653	1,285,920	6,356,000
1937	1,839,960	33,311,896	5,771,871	4,164,245	23.13	180,000	8.00	2,724,245	1,249,768	8,250,000
1938	2,087,188	35,803,704	6,773,409	5,445,867	6.05	900,000	1.60	4,005,867	1,428,096	8,922,000
1939	2,305,988	39,397,379	8,667,745	7,013,250	7.79	900,000	3.50	3,863,250	1,518,393	9,532,000
1940	2,462,211	42,859,413	8,624,393	6,407,883	7.12	900,000	4.00	2,807,883	1,709,360	10,288,000
1941	3,089,954	55,945,667	12,774,685	6,780,492	7.53	900,000	5.00	2,280,492	2,011,846	12,163,000
1942	3,492,343	68,009,070	15,744,654	6,439,818	7.16	900,000	3.75	3,064,818	2,463,575	13,690,000
1943	3,569,030	74,752,235	14,614,373	6,081,789	6.76	900,000	4.75	1,806,789	2,448,032	16,177,000
1944	3,692,352	76,668,879	13,755,798	5,639,253	6.27	900,000	4.00	2,039,253	2,662,119	16,825,000
1945	3,529,468	76,153,543	12,726,620	5,613,605	6.24	900,000	4.00	2,013,605	2,922,451	17,871,000
1946	3,026,413	75,229,683	13,814,970	8,461,311	9.40	900,000	5.00	3,961,311	2,109,559	18,191,000
1947	3,608,903	104,401,628	16,221,459	9,883,845	2.20	4,500,000	1.20	4,483,845	2,240,280	23,096,000
1948	4,042,181	122,848,790	21,999,072	13,459,808	2.99	4,500,000	1.00	8,959,808	2,716,100	25,951,000
1949	4,526,115	135,304,255	23,780,430	14,509,752	3.22	4,500,000	1.00	10,009,752	3,343,994	29,178,000
1950	4,888,732	151,565,906	24,893,941	13,247,712	2.94	4,500,000	1.20	7,847,712	3,872,468	33,690,000
1951	5,479,314	179,405,026	20,926,313	10,776,927	2.41	4,475,000	1.20	5,391,477	5,053,180	39,175,000
1952	6,034,443	208,155,695	31,375,205	12,030,063	2.69	4,475,000	1.20	6,660,063	5,391,292	42,535,000
1953	6,711,222	237,003,969	36,077,913	13,232,549	2.82	4,698,750	1.20†	7,862,549	5,607,631	49,629,000
1954	5,828,760	215,923,244	27,231,414	12,752,975	2.65	4,816,218	1.20†	7,114,475	6,427,030	49,415,000
1955	5,616,793	201,718,743	17,274,396	8,026,152	1.67	4,816,218	1.20	2,246,691	7,186,735	50,011,000
1956	5,864,034	214,692,297	19,786,812	9,751,671	2.02	4,821,968	1.20	3,970,484	7,352,741	52,528,000
1957	6,116,077	227,224,930	19,955,587	9,777,599	2.03	4,822,068	1.20	3,991,177	7,508,440	53,238,000
1958	6,982,022	257,112,848	22,489,222	10,836,305	2.25	4,822,518	1.20	5,049,659	8,496,850	57,620,000
1959	8,064,756	295,992,022	29,075,116	13,028,672	2.69	4,851,698	1.25	6,988,311	10,082,726	62,843,000
1960	8,477,099	308,755,069	33,451,482	15,415,910	3.15	4,891,539	1.40	8,595,865	10,580,827	65,309,000
1961	8,508,286	309,807,214	30,873,888	15,115,680	3.08	4,904,491	1.50	7,769,730	11,157,507	66,232,000
1962	9,034,636	327,168,191	34,819,131	17,009,029	3.47	4,906,059	1.50	9,650,411	12,307,190	70,023,000

§Shares outstanding at December 31.

‡In addition to cash dividends of $3.00 per share paid in 1933 and $1.00 per share in 1935, there was a distribution of 18,000 shares of The Borden Company stock in 1933 and 9,000 shares of The Borden Company stock in 1935.

†In addition to cash dividend of $1.20 per share paid in 1953 and 1954, a 5% dividend in shares of the corporation was distributed on December 30, 1953; and a 2½% dividend in shares of the corporation was distributed on December 30, 1954.

°Presidential Order effective March 1 reduced quantity of grains used in brewing to 70% of 1945 usage. Reduction remained in effect until September 1 when usage was increased to 85%, restriction removed on December 1.

APPENDIX 3

EXHIBIT H TO STIPULATION ON COUNT I

High and Low Market Prices of Shares of Anheuser-Busch, Incorporated

Based upon the highest bid for each day as reported by a national quotation service, the range of such bids (not adjusted for stock dividends of 5% paid in December, 1953 and 2-1/2% paid in December, 1954) has been as follows:

Year	High	Low
1952	23-5/8	21
1953	34	23-1/2
1954	38	25-1/4
1955	28-3/8	19-1/2
1956	23	18-1/2
1957	20-1/8	16-1/2
1958	23	16-1/2
1959	28-7/8	22-1/2
1960	41-1/8	25-1/8
1961	58-1/4	36-3/4
1962	56-3/4	34-3/4
Period 1-1-63 to 5-1-63)	58-1/4	47-1/2